



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Kory Langhofer, Esquire  
649 North Fourth Avenue  
Phoenix, AZ 85003

**MAY - 3 2017**

Re: MUR 7128  
KelliPAC

Dear Mr. Kenney:

This is in reference to the complaint your client, Matthew J. Kenney, filed with the Federal Election Commission on August 19, 2016, concerning KelliPAC and Doug McKee in his official capacity as treasurer. After considering the circumstances of this matter, the Commission determined to dismiss this matter and closed the file on April 17, 2017. The Factual and Legal Analysis, which more fully explains the basis for the Commission's decision is enclosed.

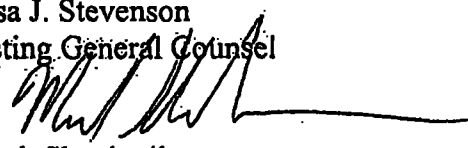
Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016), effective September 1, 2016.

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. *See* 52 U.S.C. § 30109(a)(8).

If you have any questions, please contact me at (202) 694-1650.

Sincerely,

Lisa J. Stevenson  
Acting General Counsel

BY:   
Mark Shonkwiler  
Assistant General Counsel

Enclosure  
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: KelliPAC  
and Doug McKee in his  
official capacity as treasurer

MUR: 7128

**I. INTRODUCTION**

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The Complaint alleges that KelliPAC and Doug McKee in his official capacity as treasurer (the "Committee") failed to timely file 24- or 48-Hour Reports for a then-unknown number of independent expenditures supporting Kelli Ward, a candidate in Arizona's August 30, 2016, Republican primary election for the U.S. Senate. The Committee responded by stating that it had been unaware of the filing requirement and upon learning of the requirement on August 23, 2016, it immediately filed late 24- or 48-Hour Reports for \$710,787.55 in independent expenditures it had made in July and August 2016. Because the Committee filed the reports disclosing its independent expenditures before the August 30, 2016, primary election, the Commission exercises its prosecutorial discretion to dismiss the allegations.

**II. FACTUAL AND LEGAL ANALYSIS**

**A. Factual Background**

KelliPAC is an independent-expenditure-only political committee that is registered with the Commission.<sup>1</sup> KelliPAC was formed specifically to support Ward's campaign against

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<sup>1</sup> Statement of Organization, KelliPAC (Feb. 18, 2015), <http://docquery.fec.gov/pdf/988/15031394988/15031394988.pdf>.

1 Senator John McCain in Arizona's August 30, 2016, primary election.<sup>2</sup> Doug McKee is  
2 KelliPAC's treasurer.

3 On August 15, 2016, the Committee reportedly announced its plan to spend between  
4 \$600,000 and \$1.2 million on advertisements supporting Ward and opposing McCain in the  
5 upcoming Republican Senate primary election.<sup>3</sup> On or about August 12, 2016, the Committee  
6 began airing a television advertisement titled "Betrayed Us" in the Phoenix and Tucson markets.<sup>4</sup>  
7 The ad expressly advocated the election of Ward, and included a large graphic stating "Kelli  
8 Ward for U.S. Senate."<sup>5</sup> Complainant alleges that he did not find any 24- or 48- Hour Reports  
9 disclosing expenditures for the advertisement in the Commission's database, and he filed a  
10 Complaint on August 19, 2016, alleging that KelliPAC failed to disclose the expenditures.<sup>6</sup>

11 The Committee acknowledges that it failed to file timely 24- and 48-Hour independent  
12 expenditure reports.<sup>7</sup> The Committee explains that it mistakenly believed that "PACs were  
13 excluded from [the pre-election reporting requirements] because of the 'Candidates Only'

<sup>2</sup> <http://kellipac.us/mission-statement/>. Ward lost the primary election. The Committee has cash on hand of \$7,000.47 and zero debts. 2016 Year End Report, KelliPAC (Feb. 1, 2017), <http://docquery.fec.gov/pdf/267/201702019042403267/201702019042403267.pdf>.

<sup>3</sup> See Compl., Cover letter; <http://azcapitoltimes.com/news/2016/08/15/pro-ward-super-pac-plans-seven-figure-ad-campaign/>.

<sup>4</sup> Compl. at 1; [http://politicaladarchive.org/ad/PolAd\\_JohnMcCain\\_KelliWard\\_9uz6d/](http://politicaladarchive.org/ad/PolAd_JohnMcCain_KelliWard_9uz6d/). The Complaint alleges that the ad cost at least \$29,540 to run between August 12 and 14. Compl. at 1. McKee reportedly stated on August 15, 2016 that the ad costs \$600,000. <http://www.politico.com/tipsheets/morning-score/2016/08/the-gop-establishment-strikes-back-215871>.

<sup>5</sup> <https://www.youtube.com/watch?v=ZOldkK8VLxs>. The ad is also referred to as the "Time for Change Kelli" ad. <http://www.iagreetosec.com/portfolio/kelli-ward-super-pac-john-mccain-ad/>.

<sup>6</sup> Compl. at 2.

<sup>7</sup> Committee Resp. at 1 (Aug. 30, 2016).

[heading] under the '48 hour Notices' section" of the Commission's "Getting Started Manual."<sup>8</sup>

After learning of the Complaint, the Committee conferred with Commission's Reports Analysis

Division staff on August 23, 2016, and learned it should have filed 24- and 48-Hour Reports.<sup>9</sup>

On August 23, 2016, the Committee filed untimely 24- and 48-Hour Reports disclosing 27

independent expenditures totaling \$710,787.55 that it made between July 1 and August 23,

2016.<sup>10</sup>

The Committee disclosed total independent expenditures of \$761,327.53 on its 2016

Year-End Report.<sup>11</sup> Of the 30 independent expenditures that the Committee disclosed, 27 of

them, totaling \$710,787.55, were disclosed late.<sup>12</sup>

<sup>8</sup> *Id.* The Committee claims that it included a copy of the "Manual" page in its Response, however, the referenced attachment was actually a copy of the Commission's public notice of the 24-Hour reporting period.

<sup>9</sup> Committee Resp. at 1. The Complaint was mailed to the Committee on August 24, 2016. The Complaint, however, was publicized as early as August 22, 2016, and information shows that the Committee was aware of the Complaint before it filed its 24 and 48-Hour Reports. See <http://www.12news.com/news/politics/mccain-foe-gets-money-from-billionaire-tied-to-trump-breitbart/305173825>; <https://morningconsult.com/2016/08/23/super-pac-spending-john-mccain-kelli-ward/>. The Committee contacted RAD on August 23, 2016, to inquire whether it was in compliance with its primary election filings in light of the instant Complaint and spoke with a RAD Analyst, who explained the 24 and 48-Hour reporting requirements and suggested that the Committee also review the Commission's Campaign Guide and Getting Started with FECfile User Manual for PAC and Party Committees.

<sup>10</sup> Committee Resp. at 1, Attachs. 6-7; <http://docquery.fec.gov/pdf/712/201608239023730712/201608239023730712.pdf#navpanes=0>; <http://docquery.fec.gov/pdf/699/201608239023730699/201608239023730699.pdf#navpanes=0>. The expenditures reported on the 24- and 48-hour reports included various independent expenditures from July 2016 that the Committee previously reported in its 2016 August Monthly Report.

<sup>11</sup> 2016 Year End Report, KelliPAC (Feb. 1, 2017), <http://docquery.fec.gov/pdf/267/201702019042403267/201702019042403267.pdf>.

<sup>12</sup> Two of the independent expenditures that were filed on August 23, 2016, were not untimely disclosed — the \$18,750 expenditure that was disseminated on August 23, 2016, was timely disclosed in the Committee's 24-Hour Report on August 24, 2016, and the \$689.98 expenditure that was disseminated on August 30, 2016, is outside the 24-Hour reporting period, which ended on August 28, 2016. On October 21, 2016, the Committee disclosed an additional independent expenditure of \$31,100 that it reported as having been disseminated on September 10, 2016 October Monthly Report, KelliPAC (Oct. 21, 2016); <http://docquery.fec.gov/pdf/024/201610219034504024/201610219034504024.pdf>. On January 29, 2017, RAD issued a RFAI to determine whether the communication was disseminated prior to the primary election. <http://docquery.fec.gov/pdf/361/201701290300076361/201701290300076361.pdf>.

**B. Legal Analysis**

Committee treasurers are required to file reports of disbursements, including any independent expenditures the committee makes.<sup>13</sup> A committee that makes independent expenditures must report them in its regularly scheduled disclosure reports in accordance with 11 C.F.R. § 104.3(b)(3)(vii). A committee is also required to file a 24-Hour independent expenditure notice when it makes more than \$1,000 in independent expenditures within 20 days, but more than 24 hours before, the date of an election, and must file additional notices within 24 hours after each time it makes or contracts to make independent expenditures aggregating at least an additional \$1,000 with respect to that election.<sup>14</sup>

Additionally, a political committee that makes or contracts to make independent expenditures aggregating \$10,000 or more, in connection with a given election, at any time during a calendar year up to and including the 20th day before the date of an election shall file a report describing the expenditures within 48 hours.<sup>15</sup> These reports, known as 48-Hour Reports, must be filed by the end of the second day following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated.<sup>16</sup> A committee is required to file additional reports within 48 hours after each

<sup>13</sup> 52 U.S.C §§ 30104(a), (b); 30104(b)(4)(H)(iii), *see also* 11 C.F.R. § 104.3(b)(1)(vii). An “independent expenditure” is an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or their agents, or a political party committee or its agents. 11 C.F.R. § 100.16(a).

<sup>14</sup> 52 U.S.C. § 30104(g)(1); 11 C.F.R. § 104.4(c). The time period for 24-Hour independent expenditure reports for the Arizona primary ran from August 11 to August 28, 2016. *See* [http://www.fec.gov/info/charts\\_ie\\_dates\\_2016.shtml#anchorAZ](http://www.fec.gov/info/charts_ie_dates_2016.shtml#anchorAZ).

<sup>15</sup> 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2).

<sup>16</sup> 11 C.F.R. § 104.4(b)(2).

1 time it makes or contracts to make independent expenditure aggregating at least an additional  
2 \$10,000 with respect to that election.<sup>17</sup>

3 The available information shows that the Committee untimely filed 24- and 48-Hour  
4 Reports for 27 independent expenditures totaling \$710,787.55, including disbursements for the  
5 "Betrayed Us" advertisement that is the focus of the Complaint.<sup>18</sup> The Committee acknowledges  
6 that it untimely filed these 24- and 48-Hour Reports. The Committee, however, claims that it  
7 was a first-time filer, did not know that it had to file the reports, and promptly filed the reports  
8 when it was advised that they were required. Although the Committee is ultimately responsible  
9 for filing accurate reports with the Commission and inexperience does not excuse the violation,  
10 we do not believe that further enforcement action is warranted in this instance. The record  
11 shows that the Committee was recently established and had not filed any prior 24- or 48-hour  
12 reports, and promptly filed the reports when it was advised that they were required. The  
13 Committee disclosed the expenditures before the primary election. Therefore, the Commission  
14 dismisses as a matter of prosecutorial discretion the allegation that the Committee violated  
15 52 U.S.C. § 30104(g).<sup>19</sup>

<sup>17</sup> 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2).

<sup>18</sup> The "Betrayed Us" advertisement, which aired during the relevant pre-election period, clearly identifies senatorial candidates Ward and McCain, includes the express advocacy phrase "Kelli Ward for U.S. Senate," and cost more than \$1,000, is an independent expenditure that requires appropriate 24 or 48-Hour Reports.

<sup>19</sup> *Heckler v. Chaney*, 470 U.S. 821 (1985);